UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

PETER V. SHERRY, Plaintiff,	:	
v.	:	C.A. No. 16-157S
NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, Defendant.	:	

REPORT AND RECOMMENDATION

PATRICIA A. SULLIVAN, United States Magistrate Judge.

Before the Court is Plaintiff Peter V. Sherry's motion for an order remanding this case back to the Commissioner of Social Security (the "Commissioner"), who denied Plaintiff Supplemental Security Income ("SSI") under § 1631(c)(3) of the Social Security Act, 42 U.S.C. § 1383(c)(3) (the "Act"). Plaintiff argues[1] that the Administrative Law Judge ("ALJ") erred in affording limited weight to the opinion of Dr. Mark Enander, who treated Plaintiff briefly in 2011 and opined that Plaintiff cannot stand or walk, and to the opinion of Dr. Alfred Krebs, a non-treating source who performed a worker's compensation examination and opined that Plaintiff cannot stand for more than forty-five minutes at a time. Plaintiff also contends that the ALJ erred in failing to find that severe depression limited Plaintiff to work at simple, repetitive

[1] Plaintiff also argues that the ALJ erred in declining to consider the amendment of Plaintiff's onset date to his date last insured, September 30, 2011. The ALJ's decision was based on Plaintiff's previous filing of a claim for disability insurance benefits ("DIB"), which was denied at the administrative level – in reliance on the doctrine of *res judicata*, the ALJ found that an attempt to relitigate disability for the period up to the date last insured is barred. The ALJ also declined to exercise his discretion to reopen either that disability determination or the one that followed it. This decision is not subject to judicial review. Torres v. Sec'y of Health & Human Servs., 845 F.2d 1136, 1138 (1st Cir. 1988) (per curiam). Plaintiff questions the foundation for the ALJ's determinations because the two prior decisions were not in the certified record of the instant claim. But see Tr. 63, 70 (referencing one of two DIB denials). This argument fails because Plaintiff was sent the notification of the August 7, 2012, denial of his DIB claim based on the administrative finding that he was not disabled up to the date last insured, as well as the notification of the December 17, 2012, decision that his subsequent DIB application was barred by the prior decision. ECF Nos. 20-3, 20-4. The Commissioner added copies of these notifications to the record with her motion to affirm and, on reply, Plaintiff did not challenge this proffer. Plaintiff's argument about his amended onset date is unavailing and will not be considered further.

tasks. Together, these errors affected the outcome of the application, Plaintiff asserts, because a person like him, "closely approaching advanced age," who is unable to do more than sedentary work and simple, repetitive tasks, is *per se* disabled by application of the Grids.[2] The Commissioner asks the Court to affirm the ALJ's decision.

The matter has been referred to me for preliminary review, findings and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B). Having reviewed the entire record, I find that the ALJ's findings are well supported by substantial evidence and that any error is harmless; accordingly, I recommend that Plaintiff's Motion for Remand (ECF No. 17) be DENIED and Defendant's Motion for an Order Affirming the Decision of the Commissioner (ECF No. 20) be GRANTED.

I. Background

Plaintiff was fifty-one years old as of his protective filing date of November 26, 2012. Tr. 13, 154. He grew up in Rhode Island, earning a G.E.D, but moved to Florida, where he lived until 2016, when he returned to Rhode Island. Tr. 186. Until 2009, he held a variety of jobs including self-employment as a salesman; customer service representative; and "traffic reporter" and "traffic clerk." Tr. 56, 59, 205. He stopped working after he was fired following an argument with a manager over the desire to change his hours. Tr. 41.

Plaintiff's cervical pain began after a motor vehicle accident in 1991 and was exacerbated when he was hit by a vehicle while biking. Tr. 259. His left foot pain, diagnosed as Morton's neuroma, began in 2004 or 2005 and, for a while, was well controlled after two alcohol injections. Tr. 319. However, in 2009, he hyperextended the foot in a work-related fall, which produced pain that he claims continued throughout the alleged disability period. Id. Finally, as

[2] The numbered table rules located in 20 C.F.R. Part 404, Subpart P, Appendix 2 (Medical-Vocational Guidelines) are informally known as the "Grid" or "Grids."

he told a mental health provider in June 2010, he had been "depressed on and off for the last 19 years." Tr. 409. However, apart from a short stint of six appointments for medication management with a nurse practitioner from May 2010 to February 2011, Plaintiff has had no treatment from a mental health provider and no inpatient or outpatient psychiatric treatment. Id.

Based on the evidence, the ALJ made the Step Two finding that Plaintiff's severe impairments are "(1) cervical spine dysfunction described as displacement of disc without myelopathy, mild to moderate stenosis with cervical neuritis/radiculitis; and (2) foot dysfunction described as Morton's neuroma versus bursitis versus lesion." Tr. 15. While he confirmed that depression and anxiety were established as medically determinable mental impairments, the ALJ found that neither of these mental conditions was severe. Tr. 16. At Step Three, the ALJ concluded that Plaintiff did not have an impairment or combination of impairments that met or medically equaled any Listing. Tr. 18. Next, the ALJ found that Plaintiff retained the residual functional capacity ("RFC")[3] to perform light work limited by the need to change position while at work during normal break and meal periods and the capacity only occasionally to kneel, crawl, and climb stairs and ramps. Mentally, the ALJ did not find any material limitations, opining that Plaintiff has the capacity to understand, remember and carry out multiple-step tasks, to appropriately interact with supervisors, coworkers, and the public, as well as to identify and avoid normal workplace hazards and to adapt to routine changes in the workplace. Tr. 18-19.

Based on this RFC, at Step Four, the ALJ found that Plaintiff was capable of performing past relevant work as a traffic clerk. Tr. 23. At Step Five, the ALJ made the alternative finding

[3] "RFC" refers to "residual functional capacity." Residual functional capacity is "the most you can still do despite your limitations," taking into account "[y]our impairment(s), and any related symptoms, such as pain, [that] may cause physical and mental limitations that affect what you can do in a work setting." 20 C.F.R. § 416.945(a)(1).

that there were other jobs existing in significant numbers in the national economy that Plaintiff could perform. Tr. 23-25.

II. Travel of the Case

Plaintiff protectively filed his SSI application on November 26, 2012. Tr. 13, 152-59. Initially he alleged disability commencing on October 3, 2009; his alleged onset date was amended to September 30, 2011. Tr. 13. The application was denied initially on February 1, 2013, and on reconsideration on April 18, 2013. Tr. 82-87, 95-99. Following the ALJ hearing, held on April 4, 2014, the unfavorable decision issued on August 29, 2014. Tr. 10-29. The Appeals Council denied the request for review on January 19, 2016. Tr. 1-4.

III. Standard of Review

The Commissioner's findings of fact are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g). Substantial evidence is more than a scintilla – that is, the evidence must do more than merely create a suspicion of the existence of a fact, and must include such relevant evidence as a reasonable person would accept as adequate to support the conclusion. Ortiz v. Sec'y of Health & Human Servs., 955 F.2d 765, 769 (1st Cir. 1991) (per curiam); Rodriguez v. Sec'y of Health & Human Servs., 647 F.2d 218, 222 (1st Cir. 1981); Brown v. Apfel, 71 F. Supp. 2d 28, 30 (D.R.I. 1999). Once the Court concludes that the decision is supported by substantial evidence, the Commissioner must be affirmed, even if the Court would have reached a contrary result as finder of fact. Rodriguez Pagan v. Sec'y of Health & Human Servs., 819 F.2d 1, 3 (1st Cir. 1987); see also Barnes v. Sullivan, 932 F.2d 1356, 1358 (11th Cir. 1991); Lizotte v. Sec'y of Health & Human Servs., 654 F.2d 127, 128 (1st Cir. 1981).

The determination of substantiality is based upon an evaluation of the record as a whole. Brown, 71 F. Supp. 2d at 30; see also Frustaglia v. Sec'y of Health & Human Servs., 829 F.2d

192, 195 (1st Cir. 1987); Parker v. Bowen, 793 F.2d 1177, 1180 (11th Cir. 1986) (court also must consider evidence detracting from evidence on which Commissioner relied). Thus, the Court's role in reviewing the Commissioner's decision is limited. Brown, 71 F. Supp. 2d at 30. The Court does not reinterpret the evidence or otherwise substitute its own judgment for that of the Commissioner. Id. at 30-31 (citing Colon v. Sec'y of Health & Human Servs., 877 F.2d 148, 153 (1st Cir. 1989)). "[T]he resolution of conflicts in the evidence is for the Commissioner, not the courts." Id. at 31 (citing Richardson v. Perales, 402 U.S. 389, 399 (1971)). A claimant's complaints alone cannot provide a basis for entitlement when they are not supported by medical evidence. See Avery v. Sec'y of Health & Human Servs., 797 F.2d 19, 20-21 (1st Cir. 1986); 20 C.F.R. § 416.929(a).

III. Disability Determination

The law defines disability as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months. 42 U.S.C. § 416(I); 20 C.F.R. § 416.905. The impairment must be severe, making the claimant unable to do previous work, or any other substantial gainful activity which exists in the national economy. 42 U.S.C. § 423(d)(2); 20 C.F.R. §§ 416.905-911.

A. Five-Step Analytical Framework

The ALJ must follow five steps in evaluating a claim of disability. See 20 C.F.R. § 416.920. First, if a claimant is working at a substantial gainful activity, the claimant is not disabled. 20 C.F.R. § 416.920(b). Second, if a claimant does not have any impairment or combination of impairments that significantly limit physical or mental ability to do basic work activities, then the claimant does not have a severe impairment and is not disabled. 20 C.F.R. §

416.920(c). Third, if a claimant's impairments meet or equal an impairment listed in 20 C.F.R. Part 404, Appendix 1, the claimant is disabled. 20 C.F.R. § 416.920(d). Fourth, if a claimant's impairments do not prevent doing past relevant work, the claimant is not disabled. 20 C.F.R. § 416.920(e)-(f). Fifth, if a claimant's impairments (considering RFC, age, education and past work) prevent doing other work that exists in the local or national economy, a finding of disabled is warranted. 20 C.F.R. § 416.920(g). Significantly, the claimant bears the burden of proof at Steps One through Four, but the Commissioner bears the burden at Step Five. Wells v. Barnhart, 267 F. Supp. 2d 138, 144 (D. Mass. 2003) (five step process applies to both DIB and SSI claims). That is, once the ALJ finds that a claimant cannot return to the prior work, the burden of proof shifts to the Commissioner to establish that the claimant could perform other work that exists in the local or national economy. Seavey v. Barnhart, 276 F.3d 1, 5 (1st Cir. 2001). To meet this burden, the ALJ must develop a full record regarding the vocational opportunities available to a claimant. Allen v. Sullivan, 880 F.2d 1200, 1201 (11th Cir. 1989).

B. Treating Physicians and Other Sources

Substantial weight should be given to the opinion, diagnosis and medical evidence of a treating physician unless there are good reasons to do otherwise. See Rohrberg v. Apfel, 26 F. Supp. 2d 303, 311 (D. Mass. 1998); 20 C.F.R. § 416.927(c). If a treating physician's opinion on the nature and severity of a claimant's impairments is well-supported by medically acceptable clinical and laboratory diagnostic techniques, and is not inconsistent with the other substantial evidence in the record, the ALJ must give it controlling weight. Konuch v. Astrue, No. 11-193L, 2012 WL 5032667, at *4-5 (D.R.I. Sept. 13, 2012); 20 C.F.R. § 416.927(c)(2). The ALJ may discount a treating physician's opinion or report regarding an inability to work if it is unsupported by objective medical evidence or is wholly conclusory. See Keating v. Sec'y of

Health & Human Servs., 848 F.2d 271, 275-76 (1st Cir. 1988). The ALJ's decision must articulate the weight given, providing "good reasons" for the determination. See Sargent v. Astrue, No. CA 11–220 ML, 2012 WL 5413132, at *7-8, 11-12 (D.R.I. Sept. 20, 2012) (where ALJ failed to point to evidence to support weight accorded treating source opinion, court will not speculate and try to glean from the record; remand so that ALJ can explicitly set forth findings).

When a treating physician's opinion does not warrant controlling weight, the ALJ must nevertheless weigh the medical opinion based on the (1) length of the treatment relationship and the frequency of examination; (2) nature and extent of the treatment relationship; (3) medical evidence supporting the opinion; (4) consistency with the record as a whole; (5) specialization in the medical conditions at issue; and (6) other factors which tend to support or contradict the opinion. 20 C.F.R § 416.927(c). A treating physician's opinion is generally entitled to more weight than a consulting physician's opinion. See 20 C.F.R. § 416.927(c)(2). If a treating source is not accorded controlling weight, the ALJ must apply the factors listed in 20 C.F.R. § 416.927(c). As SSR 96-2p provides:

> The notice of the determination or decision must contain specific reasons for the weight given to the treating source's medical opinion, supported by the evidence in the case record, and must be sufficiently specific to make clear to any subsequent reviewers the weight the adjudicator gave to the treating source's medical opinion and the reasons for that weight.

SSR 96-2p, 1996 WL 374188 (July 2, 1996). The regulations confirm that, "[w]e will always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion." 20 C.F.R. § 416.927(c)(2). However, where a treating physician has merely made conclusory statements, the ALJ may afford them such weight as is supported by clinical or laboratory findings and other consistent evidence of a claimant's impairments. See Wheeler v. Heckler, 784 F.2d 1073, 1075 (11th Cir. 1986).

A treating source who is not a licensed physician or psychologist[4] is not an "acceptable medical source." 20 C.F.R. § 416.913; SSR 06-03p, 2006 WL 2263437, at *2 (Aug. 9, 2006). Only an acceptable medical source may provide a medical opinion entitled to controlling weight to establish the existence of a medically determinable impairment. SSR 06-03p, 2006 WL 2263437, at *2. An "other source," such as a nurse practitioner or licensed clinical social worker, is not an "acceptable medical source," and cannot establish the existence of a medically determinable impairment, though such a source may provide insight into the severity of an impairment, including its impact on the individual's ability to function. Id. at *2-3. In general, an opinion from an "other source" is not entitled to the same deference as an opinion from a treating physician or psychologist. Id. at *5. Nevertheless, the opinions of medical sources who are not "acceptable medical sources" are important and should be evaluated on key issues such as severity and functional effects, along with other relevant evidence in the file. Id. at *4. The ALJ is required to review all of the medical findings and other evidence that support a medical source's statement that a claimant is disabled. However, the ALJ is responsible for making the ultimate determination about whether a claimant meets the statutory definition of disability. 20 C.F.R. § 416.927(d). The ALJ is not required to give any special significance to the status of a physician as treating or non-treating in weighing an opinion on whether the claimant meets a listed impairment, a claimant's RFC, see 20 C.F.R. §§ 416.945-946, or the application of vocational factors because that ultimate determination is the province of the Commissioner. 20 C.F.R. § 416.927(d); see also Dudley v. Sec'y of Health & Human Servs., 816 F.2d 792, 794 (1st Cir. 1987) (per curiam).

[4] The regulations recognize other categories of providers as acceptable medical sources for certain impairments; for example, a licensed optometrist is acceptable for measurement of visual acuity and visual fields. SSR 06-03p, 2006 WL 2263437, at *1.

IV. Analysis

A. Mental Health Impairments – Simple Tasks Limitation

The record reflects that Plaintiff had a limited history of complaining about depression and anxiety and getting treatment for those conditions. This sparse record was the foundation for the opinion of the SSA reviewing psychologist on whom the ALJ relied in determining that Plaintiff had no limitations arising from these impairments. Plaintiff now argues that the ALJ misread the record and erred in failing to find that depression and anxiety were severe and limited him to simple tasks. The Court's analysis of this issue begins with a summary of the treating history.

The earliest records are from the period after the biking accident. In regards to mental health, the record contains the brief May 2005 treating notes written by Dr. Frank Gomes – these have no mention of depression or anxiety and the mental status examination performed during the appointment yielded normal results. Tr. 399-400. The first reference to depression appears in the records of Pinellas Health. At intake in March 2010, based on Plaintiff's statement that he "can't hold a job due to depressive episodes," he was referred to Suncoast Mental Health. Tr. 243-46. At Suncoast, in May/June 2010, a nurse practitioner administered a brief psychosocial assessment, Tr. 416, and prepared a psychological evaluation, Tr. 409; she diagnosed depression, anxiety and cannabis/alcohol abuse in remission and assessed a Global Assessment of Functioning ("GAF") [5] score of 53, which is in the range for moderate symptoms. Tr. 410-11,

[5] GAF scores are based on the scale in general use prior to 2014. See Diagnostic and Statistical Manual of Mental Disorders, Text Revision 32–34 (4th ed. 2000) ("DSM–IV–TR"). The most recent update of the DSM has eliminated the GAF scale because of 'its conceptual lack of clarity . . . and questionable psychometrics in routine practice.'" Santiago v. Comm'r of Soc. Sec., No. 1:13-CV-01216, 2014 WL 903115, at *5 n.6 (N.D. Ohio Mar. 7, 2014) (citing Diagnostic and Statistical Manual of Mental Disorders at 16 (5th ed. 2013) ("DSM–5")). Nevertheless, adjudicators may continue to receive and consider GAF scores. SSA Admin. Message 13066 at 2-6, available at http://www nysba.org/WorkArea/DownloadAsset.aspx?id=51489 (starting at p.19 of PDF document) (viewed June 12, 2017).

418. On examination, Plaintiff was observed as neatly dressed with normal intellectual functioning. Tr. 410. After intake, Plaintiff had four appointments with the nurse practitioner for medication management from July 2010 until February 2011. Tr. 402-07. She prescribed Lexapro but switched to Wellbutrin because Plaintiff did not like Lexapro. Tr. 407. Although he was anxious because of his father's serious illness, which required him to travel frequently to Rhode Island, he stopped taking Wellbutrin because he "felt so well," and declined further medication except to address insomnia. Tr. 404-06. In February 2011, Plaintiff stopped going to Suncoast. According to the record, the Suncoast nurse is the only practitioner with mental health expertise seen by Plaintiff; all of this treatment occurred prior to Plaintiff's amended onset date of September 30, 2011.

From the end of treatment at Suncoast, there is a gap of a year with no mental health treatment. The next reference is in the 2012 notes of Dr. Speros Hampilos, who was treating Plaintiff's foot and back, but also prescribed medication for mental health issues, despite truncated mental status examinations that are all normal. Tr. 249-54. After Plaintiff stopped seeing Dr. Hampilos in September 2012, he went for almost another year without mental health treatment, finally resuming medication for depression at Community Health in May 2013, where he was seen by a nurse practitioner for both physical and mental complaints. Tr. 371-90. At intake, his mental status examination revealed depressed mood, but otherwise all observations were normal, including normal appearance and affect. Tr. 390. After that, until treatment ended in July 2013, all mental status examinations yielded entirely normal findings. Tr. 371-88. There is no other mental health treatment in the record.

Pivotal to the Court's consideration of Plaintiff's mental health argument are the three opinions regarding Plaintiff's mental health condition. First, and afforded limited weight by the

ALJ, is the consultative examination report of psychologist Dr. Linda Appenfeldt. Dr. Appenfeldt considered carefully the impact of Plaintiff's pain and physical complaints on his mental capacity to work. Tr. 268-70. She also noted that he was using marijuana almost daily, including the day before her meeting with him. Tr. 269. While she endorsed the diagnosis of depression, her mental status examination was almost entirely normal except for mild anxiety over stressors such as his health and finances, and limited judgment. Id. Her GAF assessment was 72, reflecting no more than slight impairment. Tr. 271. Her report includes an array of work activities that she concludes he would be capable of, including "simple, repetitive tasks and unskilled work," as well as mental activities involving understanding, memory, sustained concentration, persistence, social interaction and adaptation. Id.

The second opinion relevant to Plaintiff's mental health is derived from Dr. Appenfeldt's report, as well as from the treating record. Afforded great weight by the ALJ, expert SSA psychologist Dr. Jill Rowan focused on Dr. Appenfeldt's clinical observations, most importantly the near normal mental status examination. Tr. 75. Dr. Rowan opined that depression and anxiety are not severe impairments because they do not restrict at all Plaintiff's activities of daily living, social functioning, or concentration, persistence and pace. Tr. 75-76.

The third opinion, afforded limited weight by the ALJ, was prepared by psychologist Dr. Michael Eastridge for a vocational rehabilitation program unrelated to federal Social Security. Dr. Eastridge was asked to prepare a personality and intellectual functioning evaluation. Tr. 273. In contrast to the observations throughout the record that Plaintiff's appearance was consistently neat and appropriate, Dr. Eastridge described Plaintiff as disheveled in clothing and hygiene, resulting in the opinion that Plaintiff lacks the motivation to care for himself. Tr. 275. Further, Plaintiff told Dr. Eastridge that he was in therapy; in fact, as of July 2013, Plaintiff's only mental

health treatment was at Community Health Center, where his mental status examinations were normal and his only treatment was medication. See Tr. 377-85. Dr. Eastridge's intellectual testing yielded such anomalous scores (particularly extremely low processing speed) that Dr. Eastridge rejected his own test results and opined that Plaintiff has average intelligence. Nevertheless, he recommended psychiatric and psychological treatment for depression followed by work, part-time at first, in a low stress environment with a job coach. Tr. 276. The opinion concludes that "[c]urrently, he's extremely depressed," but that "unemployment, financial difficulties and isolation[] are likely high contributors to his depression." Tr. 278. Dr. Eastridge assessed a current GAF of 45, indicative of serious symptoms. Id.

Plaintiff's mental health argument founders on a close examination ofthese opinions. For example, he argues that Dr. Appenfeldt found him to be capable of simple tasks and did not opine that he was capable of multiple-step tasks. Tr. 268-71. The problem with this argument is that Dr. Appenfeldt did not say that "simple, repetitive tasks" were the most Plaintiff could do; rather, she also opined that he could engage in "work related mental activities involving understanding, memory, sustained concentration, persistence, social interaction, and adaptation." Tr. 271. In any event, the ALJ placed his reliance on Dr. Rowan, who had the expertise to, and did, interpret Dr. Appenfeldt's clinical observations. Dr. Rowan's opinion amounts to unrebutted substantial evidence supporting the ALJ's finding that depression and anxiety were not severe impairments. And Dr. Eastridge's seemingly inconsistent opinion does not alter the analysis. Aside from the anomalies of Plaintiff's disheveled appearance and extremely slow processing speed, the ALJ correctly observed that this was a one-time report prepared using unarticulated standards totally unrelated to those that govern decisions under the Act. Tr. 22. The ALJ also noted the inconsistency of recommending a job coach for a person of average

intelligence, as well as Plaintiff's inconsistent statements to Dr. Eastridge about his marijuana use. Id.; compare Tr. 273 ("he has been clean for 'years'"), with Tr. 275 ("He acknowledged he last smoked marijuana '. . . about a month ago . . . .'"). Most importantly, the ALJ correctly notes that it is impossible to ascertain whether Dr. Eastridge's recommendations about how Plaintiff should approach work are grounded in Plaintiff's substance abuse, capacity limitations or preferences. Tr. 22. There is no error in the ALJ's decision to afford limited weight to this non-treating source opinion.

Based on the foregoing, I find that the ALJ's Step Two finding that there were no severe mental health impairments is well grounded in substantial evidence. I also find that there is no error in the omission from the RFC of a limitation to simple tasks.

B. Enander/Krebs Opinions – Sedentary Work Limitation

As the Commissioner correctly points out, the Court's analysis could stop with the finding that there is no error in the ALJ's treatment of Plaintiff's mental health impairments. As long as Plaintiff is mentally capable of performing at least semi-skilled work, he is capable of performing past relevant work as a traffic clerk, which was found to have been sedentary.[6] Thus, if the ALJ erred in finding Plaintiff capable of light work, despite the potentially more limiting opinions of Dr. Enander and Dr. Krebs, the error is harmless, because a limitation to sedentary still results in a finding of no-disability. ECF No. 17-1 at 1, 2, 13. Nevertheless, I next briefly focus on why I find that the ALJ's decision to afford limited weight to these opinions is well grounded in substantial evidence and untainted by error.

[6] The traffic clerk job is generally performed at the sedentary level and is semi-skilled. Tr. 23, 56. A claimant is not disabled at Step Four if he can perform past relevant work either as he actually performed it or as it is generally performed. SSR 82-61, 1982 WL 31387, at *2.

Dr. Enander is a podiatrist[7] who saw Plaintiff five times between June and September 2011, all prior to the date of onset of disability (September 30, 2011). Tr. 422-29. His treating notes reflect Plaintiff's improvement after an injection. Tr. 425. More importantly, they reflect Plaintiff's ability to walk "constantly" while traveling to Rhode Island from Florida as he cared for his dying father. Tr. 423. Inconsistently, Dr. Enander rendered an opinion dated October 4, 2011, which opines that he "is partially disabled," with the limitations of "no standing or walking." Tr. 431 (emphasis supplied). This opinion clashes with the contemporaneous observation by providers at Community Health Center, whose notes reflect that Plaintiff's gait and stance were both normal. Tr. 373; see also Tr. 51 (Plaintiff testifies that he can walk "[a] few hundred feet [or] a few blocks" before needing to rest). The ALJ explained his "good cause" for giving the opinion limited weight: that it was rendered in connection with disability rules very different from those applicable under the Act, and that it is inconsistent with the reality that Plaintiff was receiving conservative treatment and was obviously ambulatory. Since Dr. Enander's treating notes clearly reflect that Plaintiff could and did walk, at times "constantly," albeit with pain, the ALJ's decision to afford his opinion limited weight is amply supported by the evidence.[8]

[7] As a podiatrist, Dr. Enander is an "acceptable medical source" under the applicable regulations only "for purposes of establishing impairments of the foot, or foot and ankle . . . ." 20 C.F.R. § 416.913(a)(4). Because his opinion is proffered in connection with functional limitations stemming from a foot impairment, as to which a podiatrist is not an "acceptable medical source," 20 C.F.R. §§ 416.902; 416.913(a)(4), the rules providing that a treating source's medical opinion carries a presumption of weight and can only be discounted for "good reasons" do not apply. See Faraone v. Colvin, No. CA 13-073 ML, 2014 WL 877064, at *11 (D.R.I. Mar. 5, 2014) (reports not generated by acceptable medical sources are "not entitled to any particular level of weight or deference") (citing SSR 06-03p, 2006 WL 2329939, at *2). Nevertheless, the ALJ articulated reasons for her treatment of the Enander opinion that are well grounded in the evidence.

[8] Plaintiff points out that the record reflects ongoing consideration, including by Dr. Enander, of the possibility of surgery to address the neuroma in his left foot. See, e.g., Tr. 431. However, as the ALJ observed, Plaintiff discussed the surgical option with Dr. Ian Klein more than two years later, in January 2014, and was told that it would require recovery time of four to six weeks, well short of what is necessary to constitute a disability. See Tr. 21 (citing Tr. 317).

Dr. Krebs (who disagreed with Dr. Enander's opinion regarding the cause of Plaintiff's foot impairment) is a non-treating podiatrist who performed a one-time evaluation in connection with Plaintiff's worker's compensation claim. His opinion states that Plaintiff's foot condition was "a minor component to his current clinical condition," and that Plaintiff "could preform [sic] any type of sedentary job," as well as that "he could stand on his feet for up to a half hour to forty-five minutes at a time." Tr. 436. The ALJ gave little weight to Dr. Krebs's opinion because it was clear that his references are grounded in a worker's compensation system of regulations, so that the meaning of the term "sedentary," as used in his opinion, is at best vague and unclear. See Tr. 22. This "reason" is well founded. For starters, the ALJ is right that Dr. Krebs's opinion that Plaintiff could stand for forty-five minutes "at a time" is not the same as an opinion that an individual can stand for no more than two hours over an eight-hour work day, which limns "sedentary" work under the Act. Indeed, the SSA expert's opinion that Plaintiff could stand or walk for "[a]bout six hours in an 8-hour workday," which is consistent with work at the light exertional level, may well harmonize with Dr. Krebs's limit of no standing for more than forty-five minutes at a time, depending on what the latter really means. See Tr. 77. Thus, while the ALJ was not required to give "good reasons" for giving limited weight to the opinion of this non-treating source, she did so. I find no error in that determination.

For the reasons stated above, I recommend that the Court affirm the weight afforded by the ALJ to the opinions of Dr. Enander and Dr. Krebs.

V. Conclusion

Based on the foregoing analysis, I recommend that Plaintiff's Motion for Remand (ECF No. 17) be DENIED and Defendant's Motion for an Order Affirming the Decision of the Commissioner (ECF No. 20) be GRANTED. Any objection to this report and recommendation

must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
June 12, 2017